NO. 47868-4

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

ANTHONY A. MORETTI,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

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I. COUNTER STATEMENT OF THE CASE

a. Procedural History

The appellant was originally charged by Information filed on January 6, 2015. CP 1. An Amended Information was filed on March 23, 2015 alleging three charges: 1) Robbery in the First Degree, 2) Assault in the Second Degree (against Michael L. Knapp), and 3) Assault in the Second Degree (against Tyson Ball). CP 31.

The trial commenced on July 14, 2015. The appellant was found guilty as charged on July 16, 2015. CP 14-17. The appellant was sentenced to Life without the possibility of early release on all three charges on July 24, 2015. CP 82.

b. Statement of Facts

On September 11, 2014, Michael Knapp, "AKA "Chief," reported that he had been jumped at the boat launch just outside of Oakville in Grays Harbor County. RP 64, 106, 154, 209, 210. The boat launch is in a secluded area and is surrounded by blackberry bushes,

trees, and brush with some trails in the brush. RP 65, 157, 209. The scene was photographed by Sergeant Don Kolilis of the Grays Harbor County Sheriff's Office and the photographs were admitted at trial without objection. RP 66, 67, 68, 76. Mr. Knapp was covered in blood and sustained significant injuries during the attack, which were photographed by Deputy Eric Cowsert of the Grays Harbor County Sheriff's Office. RP 41. The photographs were admitted and published at trial without objection. RP 42.

Mr. Knapp had gone to the boat launch with another man, Tyson Ball, in order to buy drugs. RP 156. Mr. Knapp had won a jackpot of $1,250 at the Little Creek Casino a few days before the attack and had between $900 and $1,000 left of the money with him when he and Mr. Ball went to the boat launch. RP 158, 202. Mr. Knapp was going to buy the drugs with some of the money he had won before going to the casino that day. RP 157. Mr. Knapp testified at trial that winning the jackpot was a big moment for him and that

everybody sees when you win a jackpot. RP 158. At trial, documents from Little Creek Casino were admitted into evidence showing that Mr. Knapp won a $1,250 jackpot on September 6, 2014. RP 202. At trial, Mr. Ball also testified that Mr. Knapp had the money for the drugs and that Mr. Knapp had about $1,000 or so on him from money he won at the casino when they went to the boat launch. RP 109.

Mr. Ball had made arrangements for them to meet a girl, identified as Halli Hoey, who Mr. Knapp had seen around before, at the boat launch in order to pick up methamphetamine from her. RP 156, 161. Mr. Ball testified at trial that when he and Mr. Knapp first arrived at the boat launch, the only person there was Ms. Hoey, who also had a toddler with her at the time. RP 112, 113. Mr. Ball also testified that he made the arrangements to meet with Ms. Hoey at the boat launch to buy the drugs through a man named Jon [Jonathan] Charlie, who Mr. Ball knew and had seen in person before. RP 107, 111, 112. Mr. Ball described Jon

Charlie as a heavier guy, big, tall, Hispanic looking. RP 112. Detective Keith Peterson of the Grays Harbor County Sheriff's Office, the lead detective on the case, also testified that Jon Charlie was 6'2", 290 pounds. RP 91, 234. Ms. Hoey also testified at trial that Jonathan Charlie was "a big overweight white man." RP 289.

Mr. Knapp and Mr. Ball were able to meet up with Ms. Hoey, but she did not have any drugs at the time. RP 161. At trial, both Mr. Knapp and Mr. Ball testified that it seemed strange that she didn't have the drugs and Mr. Ball testified that Ms. Hoey seemed nervous. RP 114, 162. Once it was clear that Ms. Hoey didn't have any drugs for them to buy, Mr. Knapp and Mr. Ball left the boat launch and headed back to town. RP 162. While headed back to town, they received a call that Ms. Hoey's car battery was dead. RP 162. Both Mr. Knapp and Mr. Ball testified that they went back to help because her car allegedly wouldn't start and she had a child with her. RP 115, 162.

When they initially returned to the boat launch to help Ms. Hoey, she and the child who was with her, were still the only people there. RP 116, 163. As Mr. Ball was getting out the jumper cables to help Ms. Hoey, the appellant popped out of the bushes and was walking around the boat launch area, eventually coming up to ask for a cigarette and a light. RP 117. Ms. Hoey testified at trial that she thought someone asked for a cigarette and she saw somebody smoking a cigarette at the boat launch. RP 311. At trial, Mr. Ball testified that Ms. Hoey became more nervous, way more nervous, when the appellant came out of the bushes. RP 117. Mr. Ball further testified that it was at this time that the appellant pulled a small bat from his pants and attacked them, striking him first because he had gotten in between the appellant and Mr. Knapp. RP 118, 119. Mr. Ball testified that a second man, later identified as Sam Hill, came out of the bushes, armed with an ASP baton. RP 120, 127. Mr. Ball described the baton as a metal

baton that comes out with a spring, an expandable baton. RP 120.

Mr. Ball testified that he was hit on the arms with the bat by the appellant and that the bat broke on his arms. RP 121. When deputies from the Grays Harbor County Sheriff's Office later searched the boat launch for evidence, a broken bat was located at the scene. RP 71, 212. The bat, along with a cigarette with blood on it and a napkin with blood on it, were collected as evidence and the bat was admitted into evidence during trial without objection. RP 74. Mr. Ball also testified that he was hit on the head with the baton by Sam Hill. RP 120. Mr. Knapp was also attacked by the appellant and Sam Hill. RP 121. Mr. Knapp testified several times that he was in shock as a result of the attack and that he was in pain after, describing his injuries as including his forehead, the back of his head, and his ear being split open as well as injuries on his arms from tying to block the attack. RP 164, 168, 171.Mr. Ball testified at trial that he was chased off by Sam Hill while the appellant

continued beating up Mr. Knapp. RP 122. Both Mr. Knapp and Mr. Ball testified that the appellant and Sam Hill focused their attack on Mr. Knapp. RP 122, 165. Both Mr. Knapp and Mr. Ball both testified that Mr. Knapp tried to defendant himself with a knife, but he couldn't because he was beat down. RP 123, 166. During the attack, the appellant and Sam Hill were telling Mr. Knapp to give them the money and they took his money from him. RP 123, 125, 167.

Mr. Knapp testified at trial that Sam Hill came out of the bushes with a bat while Mr. Ball was starting to help jumpstart Ms. Hoey's car. RP 163. Mr.Knapp testified that he went over to help Mr. Ball when the appellant jumped out and started beating him with a club, describing it as one that is thrown out like a cop carries. RP 163. Mr. Knapp testified that after Mr. Ball ran off, the two men – the appellant and Sam Hill – both jumped him, took his money, and kept beating him. RP 163. Mr. Knapp recognized Sam Hill and acknowledged that he was the only one of the two men that he knew

prior to the attack. RP 163. Both Mr. Knapp and Mr. Ball testified that Ms. Hoey took off after the appellant and Sam Hill began attacking them. RP 122, 165. Mr. Ball specifically testified that Ms. Hoey's car evidently worked and that it turned right over when she drove off. RP 122. Sergeant Kolilis also identified and photographed burnout marks at the boat launch that were consistent with information that he received that one of the parties involved had burned out in a hurry to get out of there. RP 65. The photographs of the burnout marks were admitted into evidence without objection. RP 67.

At trial, Mr. Knapp specifically identified the appellant, Anthony Moretti, as the other man who jumped him and beat him with a club at the boat launch. RP 155. Mr. Knapp testified that he did not know the appellant or his name prior to the attack. RP 156. Mr. Knapp gave deputies a description of the appellant after the attack, describing him as 5'7", slight build, and lighter skin. RP 217. The appellant is approximately

5'5" and 145 pounds with a slight build and light skin. At trial, Mr. Ball also specifically identified the appellant, Anthony Moretti, had attacked him and Mr. Knapp at the boat launch. RP 107. Like Mr. Knapp, Mr. Ball also testified that he did not know the appellant or his name prior to the attack. RP 107. Through the investigation, Grays Harbor County Sheriff's deputies obtained information from Ms. Hoey that the appellant was the other man with Sam Hill at the time Mr. Knapp and Mr. Ball were attacked. RP 290, 299, 301. Both Mr. Knapp and Mr. Ball were then shown a photo montage that included the appellant. RP 238, 282.

Mr. Knapp was shown the photo montage by Detective Peterson a few days after the attack. RP 171, 178, 238. At trial, Mr. Knapp identified the photo montage and testified that he had picked the appellant out of the 6 people as the one who jumped and robbed him. RP 174. Mr. Knapp further testified that he chose photo Number 2 on the photo montage and identified the appellant in the courtroom as the person in photo

Number 2. RP 174. At trial, after being questioned on cross about his memory of faces, Mr. Knapp stated that he remember the appellant's face in particular because he attacked him. RP 194. Mr. Knapp also testified at trial that he said he didn't remember every detail of the day because "you get beat with a baseball bat, it's going to be little fuzzy afterward…[y]ou know, you get hit in the head about ten times, whatever." RP 195.

Mr. Ball was shown the photo montage that was prepared by Detective Peterson and presented by Detective Jamie McGinty of the Lewis County Sheriff's Office in January of 2015, several months after the attack. RP 129, 282. Mr. Ball identified the appellant almost as soon as it was presented to him, appearing to be very certain of the identification and telling Detective McGinty that he would never forget [the appellant's face]. RP 283, 284. Mr. Ball testified at trial that he was "really sure" of his identification of the appellant in the photo montage and that it had not taken him long at all to identify the appellant. RP 134.

After having to have a material warrant signed to secure Ms. Hoey's appearance, Ms. Hoey testified at trial. RP 258. Ms. Hoey was also shown the photo montage and identified the appellant as the person who was with her and Sam Hill that day. RP 298, 301, 311. The photo montages presented at trial in which Mr. Knapp, Mr. Ball, and Ms. Hoey had identified the appellant were admitted into evidence over the defense's objections that the montages were prejudicial, that the best evidence was the testimony of the witnesses, not the montages, that the evidence was cumulative, hearsay, and chain of custody. RP 244, 245. The Court over-ruled the defense objections to the montages and the montages were admitted into evidence. RP 248, 285, 299.

At trial, Ms. Hoey testified that they had picked the appellant up on their way to the boat launch, describing him as a white man, bald. RP 290. Ms. Hoey, however, initially denied telling Officer Peterson during his investigation that a person named "Anthony" had been involved in the incident at the boat launch. RP 317.

Ms. Hoey was recalled and was confronted with information that she had given to Detective Peterson that she was afraid for her children's lives as the reason she had not initially talked about the appellant being at the boat launch. RP 330. Ms. Hoey continued to deny giving Detective Peterson the name of "Anthony" in reference to the appellant. RP 335.

The Court allowed Detective Peterson to re-take the stand to provide information about what Ms. Hoey had told him for the purpose of impeaching Ms. Hoey. RP 336, 337. The Court provided the jury with instruction that the recollection of what Detective Peterson recalled Ms. Hoey telling him was being allowed for the purpose of impeaching her credibility only and was not substantive evidence. RP 337. Detective Peterson testified that Ms. Hoey was asked if she knew who the person was who had been picked up on the way to the boat launch and Ms. Hoey said she had been introduced to him as "Anthony." RP 337. Detective Peterson also testified that Ms. Hoey was

initially reluctant to talk with him and she had indicated very seriously that she was very afraid what might happen to her for coming forward in the investigation. RP 338.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1) Prosecutorial Misconduct Allegations

The appellant makes several allegations of prosecutorial misconduct in this case. An appellant who alleges prosecutorial misconduct bears the burden of proving that, in the context of the record and circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson,* 172 Wash.2d 438, 442, 258 P.3d 43 (2011).

A defendant establishes prejudice by showing a substantial likelihood that the misconduct affected the jury verdict. *Thorgerson,* 172 Wash.2d at 443. Where the defendant fails to object to the prosecutor's improper statements at trial, such failure constitutes a waiver unless the prosecutor's statement is " 'so flagrant and ill-intentioned that it causes an enduring and resulting

prejudice that could not have been neutralized by a curative instruction to the jury.' " *State v. Dhaliwal,* 150 Wash.2d 559, 578, 79 P.3d 432 (2003) (quoting *State v. Brown,* 132 Wash.2d 529, 561, 940 P.2d 546 (1997)). This standard requires the defendant to establish that (1) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict," and (2) no curative instruction would have obviated the prejudicial effect on the jury. *Thorgerson,* 172 Wash.2d at 454.

In determining whether the misconduct warrants reversal, the Court will consider its prejudicial nature and cumulative effect. *State v. Boehning,* 127 Wash.App. 511, 518, 111 P.3d 899 (2005). The Court will review a prosecutor's remarks during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *Dhaliwal,* 150 Wash.2d at 578.

The appellant complains on several points during the trial related to what he refers to as "extremely

prejudicial, inadmissible hearsay," which requires reversal. What the appellant fails to point out to this Court is that these issues were addressed by the trial court prior to the start of the trial. Despite the fact that defense did not file a response to the State's Trial Memorandum and Motions in Limine or submit a Defense Trial Memorandum or Defense Motions in Limine, defense made a motion to prevent the State from presenting information about identification, which was a key point in the trial. Specifically, defense sought to prevent the State from expressing to the jury how the individuals involved were identified by the investigating deputies, claiming such testimony would be hearsay. RP 21. The trial court advised that "as far as identification, that's not hearsay." RP 21.

Furthermore, defense made a motion to prevent the State from presenting information that Sam Hill, who was separately charged and previously acquitted of Robbery charges prior to the appellant's case and who also had pending charges of Assault against the same

victim in another county, was present at the boat launch and known to Mr. Knapp. RP 23. The trial court ruled prior to trial that it did not believe that the fact that Sam Hill was there at the scene of the alleged attack was off limits. RP 25. The trial court specifically ruled that if the State was going to have Mr. Knapp say that two men jumped out, one of whom was Mr. Hill, and he started hitting him and saying give me your money, that was coming in. RP 26. The trial court further ruled that what went on during the crime would be admissible and that it would be substantial evidence that two men, one of whom was Sam Hill, were engaged in a joint attack on the victim[s]. RP 26. The trial court stated that Sam Hill would at least be a co-actor or a co-conspirator with the other person and that it would be part of the res gestae of the crime. RP 26. The trial court stated that the information would not be kept out because that's what was happening and it would not be offered for the truth of the matter asserted. RP 26. The trial court clarified for defense that if the State had the two of them, meaning

Sam Hill and the appellant, linked through testimony with one of them being identified as Sam Hill and the appellant as the other through an identification lineup and that they were acting together, then anything said during the heat of the battle of the assault was going to come in as well. RP 27.

Defense then argued that the identification lineup the trial court referred to – the photo montage, which was presented to three witnesses, including both victims, and contained the appellant's photo – was highly prejudicial and hearsay. RP 28. In reference to defense's argument on the photo montage being hearsay, the trial court found that if, for example, the victim, Mr. Knapp, went through the identification process with Detective Peterson and he picked someone out, that would not be hearsay. RP 29. Specifically, the trial court found that as long as the declarant testified at the trial and was subject to cross examination, then the information would not be hearsay. RP 29. The trial court ruled that it would find no issue with the State eliciting information that

Detective Peterson took Mr. Knapp's identification and used that information to link the appellant up to the crime so long as Mr. Knapp testified. RP 30.

Rule 801(d)(1) provides that a witness's out of court statement identifying a person is not hearsay. In *State v. Grover*, which was a prosecution for robbery, a witness's out of court statement to police, identifying the defendant as the robber, was admissible. Further, the court rejected a defense argument that the rule applies only to statements made during a line-up or upon viewing a photograph. *State v. Grover*, 55 Wn.App. 252, 777 P.2d 22 (1989). As stated by the trial court, the rule only applies to prior identification by a person who actually testifies as a witness. Furthermore, a prior identification remains admissible even though the witness claims at trial to have forgotten the prior identification, or refuses to answer questions about it. *Id.*

In this case, all three witnesses who identified the appellant testified at trial and were available for

cross-examination. The periods in the trial identified by the appellant as violations all related to testimony elicited from Detective Peterson, who testified after both victims, Mr. Ball and Mr. Knapp, had already testified and identified the appellant as the other man who attacked them and robbed Mr. Knapp. The information the State elicited or attempted to elicit from Detective Peterson was not being offered for the truth of the matter asserted, but rather for identification so that the jury could understand how it was that the detective narrowed down his investigation to three viable suspects – Sam Hill, the appellant, and Jon [Jonathan] Charlie.

It was clear to the jury from the testimony given by Mr. Ball and Mr. Knapp, which came prior to the defense objections during Detective Peterson's testimony that the appellant argues now are extremely prejudicial and inadmissible hearsay, that there were only two men involved in the attack against them. Appellant's Opening Brief at 21, 23-24, and 25. One of those men was Sam Hill, who Mr. Knapp knew and

recognized during the attack, and said so at trial. RP 163. The other was the appellant, Anthony Moretti, who was identified by both victims as the man who attacked them from a photo montage. RP 133, 174. The jury is entitled to have a clear understanding of the entire case, particularly of how a certain person or persons were identified as a suspect, person of interest, involved party, witness, etc…by law enforcement, and not to just have the testimony jump to an arrest with no explanation about how the deputies got there. There is simply nothing in the sections identified by the appellant to suggest that the information was so flagrant or ill-intentioned that it caused enduring and resulting prejudice or even a substantial likelihood of affecting the jury's verdicts.

It was also made clear to the jury from the un-objected to testimony from Mr. Ball and Mr. Knapp that Sam Hill and the appellant were acting in concert. As such, the inadvertent reference made by the State that the case involved a co-defendant or co-conspirator

would have had no prejudicial affect. Appellant's Opening Brief at 22. Even the trial court's ruling prior to the start of the trial, when it was discussing allowing Mr. Knapp to testify that two men jumped out and started hitting him and saying to him give me your money, referred to Sam Hill as "at least a co-actor" or a "co-conspirator." RP 26. As the trial court correctly pointed out when defense objected to the State's reference to the case involving a co-defendant or co-conspirator, the testimony of both Mr. Ball and Mr. Knapp made it clear they were attacked by two men and that it had been clearly established that Sam Hill was the other attacker so there was no prejudice. RP 218-220. This one statement did not amount to anything of significance in the totality of this trial. The jury already knew that there were two men and that they were apparently working together to beat-up Mr. Ball and Mr. Knapp and take Mr. Knapp's money.

Furthermore, the jury could have believed, which was defense's theory of the case, that Jon [Jonathan]

Charlie was the second man at the boat launch with Sam Hill who attacked Mr. Ball and Mr. Knapp and not the appellant. However, there was ample testimony from Mr. Ball, Mr. Knapp, Detective Peterson, and Ms. Hoey to eliminate Jon [Jonathan] Charlie as the second attacker. Namely, that there was a significant size difference between Jon [Jonathan] Charlie and the man alleged to be the second attacker, who just happened to match the physical description of the second attacker with Mr. Hill, and just happened to be picked out of a photo montage by all three witnesses. The facts presented in this case are simply overwhelming with regard to the appellant being the second man who attacked Mr. Ball and Mr. Knapp. Any arguable error that could possibly be put on the State for the questions it asked is harmless at most and is certainly not a basis for setting aside the jury's finding of guilt on all three charges.

The appellant further found issue with the State's question regarding Detective Peterson having had any

prior dealings with the appellant. Appellant's Opening Brief at 21. The defense objected to the question, which the trial court sustained, and the State did not pursue the question or any similar line of questioning thereafter. Unlike the characterization of the appellant that the State was attempting to deliberately implicate to the jury that the defendant had criminal history known to the officers, rather the State was merely trying to elicit information from Detective Peterson that he had not had any dealings with the appellant. This was intended to show that not only did Mr. Ball, Mr. Knapp, and Ms. Hoey have no issue with the appellant and did not even know who he was prior to the attack, but that this was also true for Detective Peterson. None of the State's witnesses, including Detective Peterson, had any reason to falsely accuse the appellant or target him for this crime, which could have been an important issue that the jury questioned in deliberation. While it may appear that the State could have been intending to bring out testimony about the appellant's criminal record or other dealings

he had with law enforcement to infer guilt, that was simply not the case. Furthermore, because the question was objected to and the line of questioning was not pursued, the jury heard no such testimony from the witnesses and thus there was no harm.

2) Improper Opinion Testimony and Bolstering

The appellant makes several allegations related to improper opinion testimony, including bolstering. In all of the allegations made by the appellant, none were objected to by defense at trial. Appellant's Opening Brief at 27-29. Because the appellant failed to object or move to strike the allegedly erroneous statement(s) of the prosecutor and, therefore, did not give the trial courts such an opportunity, he did not preserve the issue for appellate review.

The general rule is that appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a); *State v. Tolias,* 135 Wash.2d 133, 140, 954 P.2d 907 (1998); *State v. McFarland,* 127 Wash.2d 322, 332–33, 899 P.2d 1251 (1995). However, a claim of error

may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). *State v. Walsh,* 143 Wash.2d 1, 7, 17 P.3d 591 (2001); *Tolias,* 135 Wash.2d at 140, 954 P.2d 907.

Pursuant to RAP 2.5(a)(3), to raise an error for the first time on appeal, the error must be "manifest" and truly of constitutional dimension. *State v. WWJ Corp.,* 138 Wash.2d 595, 602, 980 P.2d 1257 (1999); *State v. Scott,* 110 Wash.2d 682, 688, 757 P.2d 492 (1988). The defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. It is this showing of actual prejudice that makes the error "manifest," allowing appellate review. *McFarland,* 127 Wash.2d at 333, 899 P.2d 1251; *Scott,* 110 Wash.2d at 688, 757 P.2d 492. If a court determines the claim raises a manifest constitutional error, it may still be subject to harmless error analysis. *McFarland,* 127 Wash.2d at 333, 899 P.2d 1251; *State v. Lynn,* 67 Wn.App. 339, 345, 835 P.2d 251 (1992).

Since no objection was made, the appellant has to show that there was a manifest constitutional error. He cannot do so. Both the terms manifest and constitutional have meaning. The "constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can 'identify a constitutional issue not litigated below.'" *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988) (quoting *State v. Valladares*, 31 Wn. App. 63, 76, 639 P.2d 813 (1982)). "The exception actually is a narrow one, affording review only of certain constitutional questions." *Id.* The appellant makes no statement of how he is entitled to review and the Court should not review this issue.

The appellant made no constitutional claim, only citing examples of cases where witnesses were found to have given an opinion as to the guilt of the defendant, which are clearly distinguishable. The appellant cited *State v. Black*, in which it was found that the testimony of an expert that the victim suffered from "rape trauma

syndrome" amounted to the opinion that the victim was raped, which was a disputed fact, and *State v. Carlin*, in which it was found that an officer using a K-9 tracking dog had followed a defendant's "fresh guilty scent," obviously inferring that the defendant must be guilty. Appellant's Opening Brief at 30.

However, in the examples identified by the appellant, Deputy Cowsert was asked, based on his first-hand observations of Mr. Knapp's injuries, what he observed. Deputy Cowsert's observations about what he had seen directly as a present sense impression and describing what he was looking at and what he was looking for in no way places or infers guilt upon the appellant. Appellant's Opening Brief at 27-28. The fact that Deputy Cowsert may have formed an opinion, based on his 23 years as a law enforcement officer and having both on the job training and specific courses such as basic detective school related to investigating assault cases, that the wounds he observed on Mr. Knapp appeared to be defense wounds does not in any way

establish or infer that the appellant must therefore be guilty. RP 38, 44, 49.

The appellant again alleged misconduct by the State related to the testimony of Detective Peterson, citing improper bolstering because at the conclusion of his investigation, Detective Peterson had only two suspects – Sam Hill and the appellant. Appellant's Opening Brief at 29. By this time, the State had again already presented testimony about and the identification of Sam Hill and the appellant as the sole attackers through Mr. Ball and Mr. Knapp and had walked the detective through the steps he took to reach the conclusion in his investigation that these two were the only two suspects for the attack on Mr. Ball and Mr. Knapp. There was no explicit or even near-explicit opinion on guilt, veracity, or credibility. The witnesses who actually identified the appellant as their attacker were civilians, not Detective Peterson or any other deputy. The nature of the testimony was that the two victims identified their attackers and that law

enforcement followed-up on that information in order to either confirm or deny that the person(s) identified were involved. The evidence simply led Detective Peterson to develop probable cause to believe that Sam Hill and the appellant were involved and nothing more. It was still left up to the jury to make the final decision on whether or not the appellant was involved with the attack and guilty of beating Mr. Ball and Mr. Knapp and robbing Mr. Knapp.

The appellant further attempts to argue that the nature of the charges and other evidence related to the victims' drug and alcohol use, the fact that Mr. Knapp initially lied or at least neglected to mention that he had gone to the boat launch to buy drugs, and the fact that the witnesses all tell somewhat different versions of how they recall that day playing out was also improper opinion testimony and was all direct or near direct comment on guilt, veracity or credibility, amounting to bolstering. Appellant's Opening Brief at 32. The appellant fails to point out to the Court that the State

addressed all of these issues in its closing argument. The state was very clear about acknowledging that cases like this one rely on the memories and statements of witnesses, of the victims, and on information gathered by police officers, which may lead to unanswered questions and missing information. RP 384.

The State went through in detail the issues with each witness's testimony, identifying flaws, beginning with Mr. Knapp. RP 385. For example, with regard to Mr. Knapp's initial omission about going to the boat launch to buy drugs when he told the deputy what happened, the State brought that information out during its direct of Mr. Knapp. RP 170. Again in closing, the State openly agreed that Mr. Knapp had not told the officer about being at the boat launch to buy drugs and identified other inconsistencies in his testimony with possible reasons for those issues. RP 386. The State went through each witnesses in the same detail. By doing so, far from bolstering the State's case, the State gave the jury reasons to doubt the testimony. RP 386-

390. Ultimately, however, the State argued that as much as Mr. Ball and Mr. Knapp and others may have been less than truthful on some things and less than clear on others and as unsavory as they may be given their intention to buy and use drugs that day, those things in no way excused the appellant's actions. RP 391.

It wasn't the State's misconduct or manifest error that caused the appellant to be convicted in this case, but rather the sheer volume of evidence pointing to the appellant's guilt.

3) Further misconduct

Finally, the appellant argues that the State's theme related to "givens," which was used in the State's closing, was improper and the appellant again alleging misconduct. Appellant's Opening Brief at 36. First, as argued above, the appellant made no objection to the State's closing statement during the trial and has therefore waived any appellate review. Second, again, as argued above, even if the appellant could show that

there was a Constitutional error that should be reviewed, any error is harmless.

The appellant takes issue with several statements made by the State; however, he mischaracterizes the State's argument. At no time did the State ignore the issues of credibility with regard to its witnesses. Rather, as previously argued, the State very clearly outlined those issues. RP 385-390. The State acknowledged that some jurors may have an issue with Mr. Knapp and Mr. Ball going to the boat launch to buy drugs and focused the jury on the task at hand, which was to determine the guilty or innocence of the appellant regardless of whether they agreed with Mr. Knapp's and Mr. Ball's life choices. RP 391. While the State did argue that it was a given that Mr. Knapp and Mr. Ball were attacked by someone given the injuries they sustained and that it was a given that someone robbed Mr. Knapp of his money, the State went through the evidence to apply what the jurors saw and heard during the trial to make a

finding that the appellant had committed the assault and robbery beyond a reasonable doubt. RP 392-395.

In closing argument the prosecuting attorney has wide latitude to argue reasonable inferences from the evidence, including evidence respecting the credibility of witnesses. *Thorgerson* at 448. In this case, the jury was properly instructed that:

> The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 72; Instruction No. 1.

Furthermore, it is not misconduct to argue that the evidence fails to support the defense's theory, and the prosecutor is entitled to make a fair response to the defense's arguments. *State v. Russell,* 125 Wash.2d 24, 87, 882 P.2d 747 (1994). A prosecutor may "point out a lack of evidentiary support for the defendant's theory of the case" or "state that certain testimony is not denied,

without reference to who could have denied it." *State v. Sells*, 166 Wn. App. 918, 930, 271 P.3d 952 (2012), *Thorgerson*, 172 Wn.2d at 467.

The appellant cannot carry his burden that any of the State's closing statements resulted in prejudice that "had a substantial likelihood of affecting the jury verdict" and that no curative instruction would have obviated the prejudicial effect on the jury. The jury was already given the curative instruction in Jury Instruction No. 1 as cited above. Further, there was no objection during the trial to any of the statements at issue. A party may assign evidentiary error on appeal only on a specific ground made at trial. *State v. Guloy,* 104 Wash.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied,* 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). This objection gives a trial court the opportunity to prevent or cure error. *State v. Boast,* 87 Wash.2d 447, 451, 553 P.2d 1322 (1976). For example, a trial court may strike testimony or provide a curative instruction to the jury.

In this case, the appellant failed to object or move to strike allegedly erroneous statement of the prosecutor and did not give the trial courts such an opportunity. Thus, he did not preserve the issue for appellate review.

As set out previously, the general rule is that appellate courts will not consider issues raised for the first time on appeal and a claim of error can only be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a); *State v. Tolias,* 135 Wash.2d 133, 140, 954 P.2d 907 (1998); *State v. McFarland,* 127 Wash.2d 322, 332–33, 899 P.2d 1251 (1995); RAP 2.5(a)(3); *State v. Walsh,* 143 Wash.2d 1, 7, 17 P.3d 591 (2001); *Tolias,* 135 Wash.2d at 140, 954 P.2d 907.

Since no objection was made, the appellant has to show that it was a manifest constitutional error and he again cannot do so. The appellant makes no statement of how he is entitled to review and the Court should not review this issue. The appellant merely makes reference

to an example of when a prosecutor commits misconduct in closing arguments by arguing that the jury should find the defendant guilty because there was no evidence showing he was not. Appellant's Opening Brief at 38. However, the appellant makes no reference to when the State in this case made such an argument or anything like it. The appellant simply states that defense counsel "was ineffective in sitting mute while the prosecutor's misconduct led the jury away from its proper role and duties" without identifying even one direct comment establishing the alleged misconduct. Appellant's Opening Brief at 38. It is clear instead that the appellant simply disagrees with the jury's verdicts and is making any argument, albeit unsupported and unfounded, that he can to try to overturn those verdicts.

Without an objection at trial or an identified manifest constitutional error directly related to the State's actions at trial, there is simply no merit to the appellant's argument and his request for reversal and remand for a new trial must be denied.

4) The Persistent Offender Accountability Act does not constitute cruel punishment and its application was mandatory.

Appellant claims that his committing a third, fourth, and fifth "most serious offense" in this case does not warrant the life sentence mandated by our laws and further alleges that the sentence violates the Eighth Amendment to the United States Constitution and article I, section 14 of the Washington State Constitution. He does this now despite having acknowledged that he knew at the onset that a conviction would result in a life sentence and agreeing to the imposition of said sentence without argument upon his convictions. RP 419-20.

The Eighth Amendment bars cruel **and** unusual punishment while article I, section 14 flatly bars cruel punishment. The Washington Supreme Court has held that the state constitutional provision is more protective than the Eighth Amendment in this context. *State v. Rivers*, 129 Wn.2d 697, 712, 921 P.2d 495 (1996) (citing *State v. Fain*, 94 Wn.2d 387, 392–93, 617 P.2d 720 (1980)). Consequently, if the Appellant's life sentence does not

violate the more protective state provision, further analysis under the Eighth Amendment is unnecessary. *State v. Witherspoon*, 180 Wn.2d 875, 887, 329 P.3d 888 (2014). By its explicit terms, the Persistent Offender Accountability Act (POAA) grants no discretion to judges or prosecutors in the sentencing of persistent offenders; the statutory language unambiguously requires every persistent offender to be sentenced to life in prison without possibility of parole. *State v. Crawford*, 159 Wn.2d 86, 101, 147 P.3d 1288, on remand, 150 Wn.App. 787, 209 P.3d 507 (2006). However, after several unsuccessful challenges to this statute, as recently as 2014 our Supreme Court has identified the four *Fain* factors as the appropriate measuring device for whether a sentence under the POAA in any given case is cruel under article I, section 14: (1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction. *Witherspoon*, 180 Wn.2d at 887.

The first factor presents a simple question: was the crime a "most serious offense" under RCW 9.94A.030? *Id.* at 888. Assault in the Second Degree, which accounts for two of the Appellant's most recent "strike" convictions, is a crime specifically named by the legislature as one which falls within this definition. RCW 9.94A.030(33). As a Class A offense, Robbery in the First Degree is also a "most serious offense" under the statute. The second *Fain* factor contemplates the legislative purpose behind the statute. *Witherspoon*, 180 Wn.2d at 888. The Court has recognized that "the purposes of the persistent offender law includes deterrence of criminals who commit three 'most serious offenses' and the segregation of those criminals from the rest of society." *Id.* (*Rivers*, 129 Wn.2d at 713). The State presented evidence of two prior convictions for "most serious offenses": Arson in First Degree committed in 2004 and Vehicular Assault committed in 2009. CP 107-14. The Appellant did not object to the admission of this evidence at sentencing (RP 419-20) and does not challenge the classification of those prior offenses as "most serious

offenses" here on appeal. Since the Appellant has in fact now committed three such offenses, his removal from society for life squarely serves the purpose of the POAA. Under the third *Fain* factor, the court should also consider what kind of punishment would be given for the offense in **other** jurisdictions, although "this factor alone is not dispositive" and the Appellant has not offered any analysis of how this crime might be punished elsewhere. *Witherspoon*, 180 Wn.2d at 888. The fourth and final factor to be considered is the punishment imposed for other offenses within the **same** jurisdiction. *Id.* The analysis for this factor is once again straightforward because, "[i]n Washington, **all** adult offenders convicted of three 'most serious offenses' are sentenced to life in prison without the possibility of release under the POAA." *Id.* (emphasis added). In this way, *Fain* creates a standard which can easily and uniformly be administered by the trial courts.

While *Fain* is an instance in which the Supreme Court determined that a life sentence was in fact cruel, it was decided over 36 years ago under the state's "habitual

criminal" statute, was applied to a defendant whose offenses consisted only of theft and forgery over the span of 17 years for a total loss of less than $470, and was published thirteen years before the POAA was even created. 94 Wn.2d at 390-91. The *Fain* case is not at all analogous to the case at hand, where the Appellant has now been convicted of five violent offenses (felony assault, robbery, and arson), and indeed the Appellant cites no case whatsoever in which the POAA has been found to be unconstitutional. In 2014, the Court in *Witherspoon* rejected the appellant's contention that the imposition of a life sentence without parole following a conviction for second degree robbery was cruel and unconstitutional, stating, "This court has repeatedly held that a life sentence after a conviction for robbery is neither cruel nor cruel and unusual." 180 Wn.2d at 889 (citing *Rivers*, 129 Wn.2d at 715; *State v. Manussier*, 129 Wn.2d 652, 677, 921 P.2d 473 (1996); *State v. Lee*, 87 Wn.2d 932, 937, 558 P.2d 236 (1976)). Witherspoon's earlier offenses were for first degree burglary and residential burglary with a firearm. *Id.*

In the case at hand, the Appellant's earlier offenses were for vehicular assault and first degree arson, but his current case actually contained three separate strike offenses: two counts of assault in the second degree and one count of first degree robbery. RP 411. As compared to *Witherspoon*, the Appellant's offenses are equally if not more egregious.

The Appellant presents the Court with his belief that his convictions were not the "worst felonies possible" and that they were not committed in the "worst possible ways" in an effort to argue that the law should not apply to him. *Appellant's Opening Brief*, pg. 51. This simply is not relevant to the determination. Despite his pages of efforts, the Appellant cites not one case, either federal or local, which directly holds that "proportionality" or the characteristics of an individual factor in to whether an adult offender sentenced to life without parole has been subjected to cruel punishment. The Appellant begins his argument with the federal case of *Solem*, but himself admits that the three *Solem* factors were essentially included in the four *Fain* factors of the Washington State Supreme Court.

Appellant's Opening Brief, pg. 45-46 (citing *Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001 (1983); *Fain*, 94 Wn.2d at 397). He then goes on to cite federal cases which actually held there to be "**no** proportionality guarantee." *Appellant's Opening Brief*, pg. 46 (citing *Harmelin v. Michigan*, 501 U.S. 957, 111 S. Ct. 2680 (1991); *Ewing v. California*, 538 U.S. 63, 123 S. Ct. 1166 (2003); *Lockyer v. Andrade*, 538 U.S. 63, 123 S. Ct. 1166 (2003)). Next, he cites inapplicable opinions on the imposition of the death penalty for developmentally disabled and juvenile offenders. *Appellant's Opening Brief*, pg. 47-48. Finally, the Appellant turns to *O'Dell* for the principal that youthfulness should be a reason for the court not to follow the POAA. *Appellant's Opening Brief*, pg. 48, 50 (citing, *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015)). However, as a case having nothing to do with the POAA and instead with the ability of the court to consider age as a factor for a mitigated exceptional sentence downward, *O'Dell* is simply not on point. *Id.* at 698. Even if this Court were to go along with the Appellant's contention and

thereby consider the fact that the Appellant's first two strike offenses occurred at the "tender" ages of 20 and 26, his three most recent, and arguably most important, were committed when the Appellant was 31 years old. He insists upon being treated with kid-gloves after having committed a series of very adult offenses during which time the Appellant was, in fact, an adult. There is no basis for this Court to comply with his demand. The POAA has been upheld as constitutional under this State's more stringent standard and the *Fain* factors have been identified by our Supreme Court as the proper analytical framework as recently as 2014.

The State bears the burden of proving by a preponderance of the evidence the existence of prior convictions as predicate strike offenses for the purposes of the POAA. *Witherspoon*, 180 Wn.2d at 893 (citing *State v. Knippling*, 166 Wn.2d 93, 100, 206 P.3d 332 (2009)). However, the Appellant contends, by citing recent federal cases like *Alleyne v. United States*, __ U.S. __, 133 S.Ct. 2151 (2013), that the State must do more than provide

certified copies of prior strike offenses to prove that the current offense is third strike and that question of whether the individual is a persistent offender should lie in the hands of a jury. *Appellant's Opening Brief*, pg. 60-64. The *Witherspoon* Court was asked to consider *Alleyne* and, after doing so, expressly rejected these arguments in 2014, finding the certified judgement and sentences from the prior "most serious offenses" satisfied the State's burden. 180 Wn.2d at 898. It concluded that "United States Supreme Court precedent, as well as this court's own precedent, dictate that under the POAA, the State must prove previous convictions by a preponderance of the evidence and the defendant is not entitled to a jury determination on this issue." *Id.* Furthermore, "the best evidence of a prior conviction is a certified copy of the judgment." *Id.* at 897. Because the State need not present anything more than this, a determination by a jury is not warranted.

To conclude his argument on the merits of the POAA and its application to this case, the Appellant claims

that proving notice of or misinformation about the nature of a conviction as a "most serious offense" at the time of a plea in that prior case somehow affects whether or not the State has met it's burden of proving the existence of the two prior strike offenses for purposes of sentencing under the POAA. However, the Appellant provides no law to support the idea that notice or misinformation at the time of the plea in a prior offense somehow invalidates it's later use in sentencing an individual as a persistent offender. *Knippling* is not analogous because the State in that case had not proven that the defendant had been convicted twice before "as an offender" when the definition under RCW 9.94A.030 required that the person a) be over eighteen or b) be less than eighteen but whose case is under superior court jurisdiction. *Knippling*, 166 Wn.2d at 100. Since it was not clear if the defendant was an "offender" in his prior conviction, the *Knippling* Court determined that he could not be sentenced under the POAA. *Id.* at 104. But in defining what a persistent offender is, the Appellant's carefully itemized review of RCW 9.94A.030(37) does not

identify notice of the nature of the prior offense at the time of the plea as a factor which the State must prove. There is a reason for this. RCW 9.94A.561 states:

> A sentencing judge, law enforcement agency, or state or local correctional facility may, but is not required to, give offenders who have been convicted of an offense that is a most serious offense as defined in RCW 9.94A.030 either written or oral notice, or both, of the sanctions imposed upon persistent offenders.

Procedural due process does not require that a defendant receive pretrial notice of a possible life sentence. *Crawford*, 159 Wn.2d at 102.

5) Legal Financial Obligations and Costs on Appeal

The State has no objection to all non-mandatory legal financial obligations being stricken and defers to the sound judgement of this Court on the imposition of appeal costs.

CONCLUSION

For the aforementioned reasons, the State humbly requests that this Court affirm the convictions and the sentence in this case.

DATED this 25th day of January, 2017.

Respectfully Submitted,

BY: s/ Erin C. Jany
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GRAYS HARBOR COUNTY PROSECUTOR

January 30, 2017 - 7:39 PM

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